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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-647

BARBARA N. COPELAND,

Petitioner,

v.

SAMUEL R. MARTINEZ, Director,
Community Services Administration.

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BILL LANN LEE
Suite 2030
10 Columbus Circle
New York, New York 10019

ALEXANDER G. PARK
910 17th Street, N.W.
Suite 812
Washington, D.C. 20006

Attorneys for Petitioner

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1. Petitioner first notes that the government has responded to virtually none of the arguments presented in the petition for writ of certiorari. Thus, the Memorandum in Opposition does not mention, let alone address, the language in Brown v. GSA, 425 U.S. 820, 832 (1976), holding that § 2000e-5(k) governs the award of counsel fees in a federal Title VII action.

2. Similarly, the government quotes that part of Hall v. Cole, 412 U.S. 1, 5 (1973), which notes the general power of the federal courts to award fees in bad faith cases, but fails

to discuss Hall's further holding, noted in the peitition for certiorari, that

> This [the discussion of general principles] does not end our inquiry, however, for even where "fee-shifting" would be appropriate as a matter of equity, Congress has the power to circumscribe such relief. In Fleischmann Distilling Corp. v. Maier Brewing Co., supra, for example, we held that § 35 of the Lanham Act ... precluded an award of attorneys' fees. ... Since § 35 "meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed" Congress must have intended the express remedial provisions of § 35 "to mark the boundaries to award monetary relief in cases arising under the Act."

412 U.S. at 9-10.

3. The government also does not discuss Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), which, petitioner urges, directly governs this case.

4. The Memorandum in Opposition ignores the legislative history of the Civil Rights Attorney's Fee Act of 1976, which makes it clear that the relevant language of 42 U.S.C. § 1988, which is identical to that of § 2000e-5(k), is an absolute prohibition of an award of fees to the United States. In addition to those instances already noted in the Petition for a Writ of Certiorari at pp. 11-14, petitioner calls the Court's attention

to the statement of Congressman Drinan in introducting the bill to the House subcommittee:

> [U]nder these bills the Federal government could never recover its attorney fees. On the other hand, it would be required to pay the counsel fees of a private prevailing party ...

AWARDING OF ATTORNEYS' FEES, Hearing Before the House Judiciary Subcommitte on Courts, Civil Liberties, and the Administration of Justice, (94th Cong., 1st Sess.) p. 53 (1975) (emphasis added).[1/]

5. Finally, petitioner wishes to reemphasize that just because counsel fees are not awardable, it does not follow that there is nothing to deter plaintiffs from filing meritless Title VII suits against the federal government. The far greater resources available to the United States, the cost of retaining counsel when there is little prospect of recovering fees, and the power of the court to award the other costs of

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1/ The Department of Justice, in its testimony in support of the bill, indicated that it understood thay the United States could not recover fees in a case covered by it. See, testimony of Rex E. Lee, Assistant Attorney General for the Civil Division, Hearings, supra at pp. 176-177.

litigation to the government are all substantial protections against abuses of the judicial system.

CONCLUSION

In sum, petitioner urges that the decision below is in direct conflict with the decisions of this Court in Brown v. G.S.A., supra, and Fleischmann Distilling Corp. v. Maier Brewing Co., supra, and therefore should be reviewed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BILL LANN LEE
Suite 2030
10 Columbus Circle
New York, New York 10019

ALEXANDER G. PARK
910 17th Street, N.W.
Suite 812
Washington, D.C. 20006

Attorneys for Petitioner